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No. 99-1711

Supreme Court, U.S.
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In The

Supreme Court of the United States

CUCAMONGANS UNITED FOR REASONABLE EXPANSION ("CURE"), a Non-profit Unincorporated Association; THOMAS BRADFORD; MARILYN SUE BRADFORD; LEO ORVANANOS; SHIRLEY ORVANANOS,

Petitioners,

versus

CITY OF RANCHO CUCAMONGA; BRAD BULLER, an Individual, in His Individual and Official Capacity; THOMAS GRAHN, an Individual, in his Individual and Official Capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

The principal question presented by the Petition is whether the district court properly abstained in this case under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). The district court and Ninth Circuit reasoned that *Pullman* abstention is appropriate because, while California appellate precedent establishes that neighboring landowners have no protectible property interest in the time extension of a pre-existing, approved tentative tract map, the California Supreme Court has not definitively addressed the issue, and therefore the state law issue is doubtful and its resolution in state court could eliminate the need for constitutional adjudication in this case.

The Petition does not point to any conflicting authority, and in fact the Ninth Circuit's decision is consistent with a prior decision of that court on a nearly identical issue. *Lapham v. California Energy Resources Conservation & Dev. Com.*, 705 F.2d 358, 359-60 (9th Cir. 1983). Petitioners are forced to argue that the Ninth Circuit erred because, as they put it, California law is "unambiguous" and "crystal clear" that they enjoy a protectible property interest. To advance this argument, however, they point the Court to inapposite authority, and ignore the complex statutory scheme in California which governs the regulation of subdivisions and which the California state courts routinely are called upon to interpret. It is telling that petitioners also disregard the California appellate authority, noted by the lower courts, which unambiguously holds that they have no protectible property interest in a map extension. The lower courts could have dismissed this case outright, but instead properly abstained on *Pullman* grounds.

The petition also asks the Court to review the Ninth Circuit's decision not to certify the uncertain state law issue to the California Supreme Court. The Ninth Circuit did no more than exercise its sound discretion, as directed by this Court's decision in *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1941). The court properly refused certification because (i) California's certification provision, by its terms, does not apply, (ii) other uncertain state law issues are raised, (iii) petitioners elected to file in federal court rather than pursue their speedy state court remedies, (iv) petitioners failed to name the developer whose entitlement they seek to invalidate, which would not be permitted in state court, (v) the issue lacks adequate factual development, and (vi) the issue is not pending before the state supreme court or sufficiently pressing to require that court's review in the first instance. Review is not warranted.

STATEMENT OF THE CASE

A. Statement of Facts.

This case concerns a 26-acre parcel of land in the City of Rancho Cucamonga, California, located next to two housing tracts at the base of the San Bernardino Mountains.[1]

[1] Importantly, petitioners chose not to name Lauren Development, the current developer of the property, as a party to this lawsuit, although the suit seeks to eradicate Lauren's valuable subdivision entitlement.

In November 1990, after two properly noticed public hearings, the City approved a negative declaration and a tentative tract map, authorizing the subdivision of the property into 40 single-family residential lots. The City's decision permitted, among other things, removal of an aged, breached earthen levee which petitioners' amended complaint alleges currently protects downslope homes.[2] To address this, the City approved the tentative map, subject to conditions which require the developer to, (a) "construct a permanent trapezoidal channel along the north tract boundary," (b) prepare a channel design justified by a final drainage study, approved by the City Engineer, to "[p]rovide a continuous seal between the off-site drainage protection" for this property and the adjacent tract, (c) have "the current FIRM [Flood Insurance Rate Map] Zone A0 designation removed from the project area" and obtain a "Conditional Letter of Map Revision (CLOMR) . . . from the Federal Emergency Management

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[2] Petitioners' Statement of the Case contains a number of factual assertions outside of the amended complaint at issue. At page 8, petitioners state that the levee "was certified by the Federal Emergency Management Agency to withstand a 100-year flood event" and that its removal, "according to several experts," threatens safety and lives. There are no such allegations in the amended complaint. Petitioners fail to state that the levee has 200 foot breach punched through it, that its utility ceased when the U.S. Army Corps of Engineers constructed the Deer Creek Debris Basin and Channel at the base of the San Bernardino Mountains in 1983, that the levee will be replaced by additional drainage protection facilities provided by this development, and that other "experts," including the Corps of Engineers, repeatedly have affirmed that the Debris Basin and Channel provides the necessary protection for these properties.

Agency (both of which have been done), and (d) have "the required drainage channel along the north project boundary . . . be operational prior to removal of the existing levee within the project area."[3] ER 40-41; CR 14.

There was no challenge to the 1990 subdivision approval, although California law permitted judicial review of the project by the filing of a timely petition for writ of administrative mandamus.[4] Cal. Civ. Proc. Code § 1094.5.

In 1992, 1993, 1995, and 1996, the City approved time extensions of the approved tentative map. The amended complaint explains:

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[3] At page 8, petitioners erroneously state that "the City conditioned its approval of the tentative map upon the construction of a debris basin to the north of the development" and that experts later "declared the debris basin to be undersized" based upon new Corps standards. This is not pleaded in the amended complaint and it is factually wrong. There can be no dispute that the Corps constructed the Debris Basin in 1983 and that it was operational for years before the City, in 1990, approved this project, subject to conditions requiring construction of an additional drainage channel along the northern tract boundary to intercept drainage between the Debris Basin and the channel.

[4] Under California case law, the City's subdivision decision became res judicata and its preclusive effect now bars any collateral challenge to that approval. *Mola Development Co. v. City of Seal Beach*, 57 Cal.App.4th 405, 410-13, 67 Cal.Rptr.2d 103 (1997) (failure to timely challenge a tentative map approval bars an action under Section 1983); *Briggs v. City of Rolling Hills*, 40 Cal.App.4th 637, 644-48, 47 Cal.Rptr.2d 29 (1995) (applying the rule to a failure to timely challenge a permit condition).

> Under California's Subdivision Map Act, tentative tract maps ordinarily would expire two years after approval if construction had not commenced. Because of the downturn in California's economy, the state legislature enacted laws to permit extensions of tentative tract maps under certain specific circumstances. The purpose of this legislation was to protect developers who had expended funds to prepare the tentative tract maps but who, at that time, were not financially able to commence construction.

ER 6. Petitioners plead the extensions were unlawful because the City failed to provide affected property owners, including petitioners, notice and an opportunity to be heard. The amended complaint further alleges: "[u]nder state and local law, defendants are required to disapprove a tentative map extension if a proposed development creates safety risks or avoidably impacts habitat." *Id.* Petitioners claim that without notice, they were deprived of the opportunity to present evidence on those state and local law issues.

In Spring 1997, with the subdivision process long since completed, the current developer, Lauren Development, applied to the City for design review of the 40 homes it proposes to build in the approved subdivision. The amended complaint alleges that petitioners first learned of the approved project on about May 23, 1997.

B. Procedural History.

Thereafter, petitioners mounted an aggressive campaign in an effort to block the project.[5] On July 2, 1997, appellant CURE initially filed this action, alleging, inter alia, violations of the Civil Rights Act (42 U.S.C. §§ 1983, 1985) and seeking declaratory and injunctive relief and monetary damages against the City and personally against the City's Planning Director and Associate Planner. On September 11, 1997, the district court granted the City's motion to dismiss, ruling that CURE's allegation

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[5] Petitioner CURE filed a separate action against the City and Lauren Development in state court in *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*, San Bernardino Superior Court Case No. RCV 30406. That suit contends that in subsequently denying the developer's application for approval of the design of the homes proposed in the subdivision, the City violated the California Environmental Quality Act ("CEQA"; Cal. Pub. Res. Code § 21000 et seq.) by failing to prepare subsequent environmental documentation based upon claimed "new information" and "changed circumstances" – including the very "health and safety" concerns alluded to here. After exhaustively reviewing all of the evidence, the superior court denied CURE's petition for writ of mandate. CURE appealed and the matter is pending in the California Court of Appeal. Cal. Ct. of App., 4 Civil No. E024244. If that were not enough, when the City finally approved the developer's design review application, the two adjoining homeowner associations again sued the City and Lauren Development in state court, reasserting the identical health and safety issues. On May 16, 2000, after reviewing yet additional evidence on the same issues, a different superior court judge again denied the petition for writ of mandate filed. *Haven View Homeowners Assoc. v. City of Rancho Cucamonga*, San Bernardino Superior Court Case No. RCV 38355.

that it is "an unincorporated nonprofit association comprised of 'property owners residing in the Central District of California,' " without more, failed to state facts sufficient to establish standing.

On September 22, 1997, petitioners filed an amended complaint, adding four individual plaintiffs described only as persons who "own property in close proximity to" the property at issue. ER 3; CR 14. The amended complaint realleged the above-noted allegations concerning the tentative map extensions, and again sought damages (including punitive damages) against the City and personally against the planners, and a declaration that the "extensions of the Tentative Map were in violation of federal law and thus of no effect." ER 16-18; CR 14.

On October 2, 1997, the City filed a second motion to dismiss or, in the alternative, to abstain. On December 12, 1997, the district court granted the City's motion. Specifically, the court dismissed petitioners' second (violation of 42 U.S.C. § 1985), third (violation of the Fourteenth Amendment), and fourth claims for relief (violation of Cal. Gov't Code § 6256), and the court granted the City's motion to abstain as to petitioners' Section 1983 claim on *Pullman* abstention grounds. As relevant here, the district court ruled:

> [I]t is not clear that plaintiffs have a relevant protectible property interest . . . [¶] The parties have not cited, nor has the court found, any California case extending Horn [Horn v. County of Ventura, 24 Cal.3d 605, 616, 156 Cal.Rptr. 718 (1979)] beyond the context of tentative map approvals to extensions like those challenged here. We cannot conclude with certainty that a

> decision extending a pre-existing approved tentative map has more than a mere "de minimis effect" on plaintiffs' property. Indeed, the Subdivision Map Act has been interpreted to "permit[ ] an extension only as to 'time' " El Patio v. Permanent Rent Control Board of Santa Monica, 110 Cal.App.3d 915, 928 (1980).

Pet., App. at p. 9a. The Court ordered the matter stayed pending resolution in state court of the uncertain determinative state law question noted. *Id.*

Instead of seizing the opportunity to refile the matter in state court, petitioners appealed on January 9, 1998. On January 21, 2000, in an unpublished memorandum opinion, the Ninth Circuit affirmed. The court of appeals held that the district court did not abuse its discretion in abstaining because all three requirements for *Pullman* abstention have been satisfied in this case. As to the third requirement, the court held that "the answer to the question whether CURE et al. have a protected property interest under state law is not clear . . . [T]he California courts have not extended the decision in *Horn* [*v. County of Ventura*, 24 Cal.3d 605, 156 Cal.Rptr. 718, 596 P.2d 1134 (1979)] beyond tentative map approval to tentative map extension, which is the issue in this case. As such, we cannot 'predict with any confidence how the state's highest court would decide' this issue." Further, after reviewing the briefs, the record and the pertinent law, the court denied petitioners' request to certify the state law question to the California Supreme Court. Pet., App. at pp. 4a-5a.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT OF APPEALS PROPERLY CONCLUDED ABSTENTION ON *PULLMAN* GROUNDS IS APPROPRIATE IN THIS CASE

The primary issue presented in the Petition is whether the court of appeals misapplied the third requirement of *Pullman* abstention. Petitioners do not cite any conflicting authority. Indeed, the Ninth Circuit's decision in this case is fully consistent with a prior decision of that court on a nearly identical issue. *See Lapham v. California Energy Resources Conservation & Dev. Com.*, 705 F.2d 358, 359-60 (9th Cir. 1983) (*Pullman* abstention appropriate where neighboring property owners contended they were entitled to notice and a hearing before state agency approval of a high voltage electromagnetic transmission line).

Instead, petitioners argue that the court of appeals erred in interpreting California law, which they assert "unambiguously" and "clearly" recognizes the right of adjacent landowners to notice and a hearing in connection with approval of a time extension of a pre-existing, approved tentative map. In support, however, petitioners point to authority which is inapposite, and they ignore the complex statutory framework which governs the regulation of subdivisions in California. Importantly, they also bury in the Petition (at p. 18) the fact that a California appellate case, *El Patio v. Permanent Rent Control Board*, 110 Cal.App.3d 915, 928, 168 Cal.Rptr. 276 (1980), has squarely addressed the issue and unambiguously

held that there is no right to notice and a hearing on a map extension.

This Court has long recognized that abstention is proper "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959). Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. *Harman v. Forssenius*, 380 U.S. 528, 534 (1965).

Under this Court's decision in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 498 (1941), abstention is appropriate where: (1) the complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open"; (2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy"; and (3) the possibly determinative issue of state law is doubtful.

The court of appeals held that the third requirement was satisfied in this case because it is not clear whether petitioners have a protected property interest in the extension of a tentative map. Pet. at App. A, p. 4a. While

noting that the California courts have not extended constitutional notice and hearing requirements to map extensions, the Ninth Circuit, like the district court, concluded that it could not "predict with any confidence how the state's highest court would decide" the state law issue. *Id.*

This Court has explained: "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975). In this case, the California Subdivision Map Act ("Map Act"; Cal. Gov't Code § 66410 et seq.) and the extensive body of California case law which has interpreted it undermine petitioners' claim of a protected property interest. Petitioners misconceive and, unfortunately, ignore the comprehensive statutory framework in California which governs the approval of subdivisions.

A. Under the California Subdivision Map Act and California Case Law, Approval of the Tentative Map is the Critical Stage in the Subdivision Process.

Under the Map Act, adjoining landowners enjoy a protectible property interest at the time the tentative map is approved. This is because the approval of a tentative map invokes "the exercise of judgment, and the careful balancing of conflicting interests, the hallmark of the adjudicative process." *Horn v. County of Ventura*, 24 Cal.3d 605, 615, 156 Cal.Rptr. 718 (1979). The California Supreme Court has explained that:

> *[T]he date when the tentative map comes before the governing body for approval is the crucial date when that body should decide whether to permit the proposed subdivision.* Once the tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval. These expenditures will result in the construction of improvements consistent with the proposed subdivision, but often inconsistent with alternative uses of the land. *Consequently it is only fair to the developer and to the public interest to require the governing body to render its discretionary decision whether and upon what conditions to approve the proposed subdivision when it acts on the tentative map.*

Youngblood v. Board of Supervisors, 22 Cal.3d 644, 655-56, 150 Cal.Rptr. 242 (1978); italics added.

The Map Act requires that a local agency make certain findings before approving a tentative map. The agency may deny approval, for example, if it finds that the subdivision design or type of improvements is likely to cause "substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat" or cause "serious public health problems." Cal. Gov't Code § 66474. Thus, issues concerning, for instance, the environmental implications of replacing an aged, breached, earthen levee as part of a new subdivision are to be addressed and resolved at the tentative map stage.

After tentative map approval, the approval of the final map becomes "a ministerial act once the appropriate officials certify that it is in substantial compliance with the previously approved tentative map." *Youngblood*, 22

Cal.3d at 656; Cal. Gov't Code § 66474.1. To the extent there is discretion in approving the final map, it is the "discretion only to determine whether there ha[s] been substantial compliance with the conditions."[6] *Soderling v. City of Santa Monica*, 142 Cal.App.3d 501, 509, 191 Cal.Rptr. 140 (1983). This is settled California law. *Great Western Savings & Loan Assn. v. City of Los Angeles*, 31 Cal.App.3d 403, 411, 107 Cal.Rptr. 359 (1973) (once the developer has relied on the approved tentative map with conditions and produced a final map which satisfies the conditions, "he is entitled to acceptance and approval of that final map without the imposition of new or altered conditions").

The Map Act also contains several provisions which address map extensions. One such provision is California Government Code section 66452.6(e). The granting of an extension under this provision is discretionary. *El Patio*, 110 Cal.App.3d at 928. However, the purpose of that extension and the nature of discretion allowed is limited. As even petitioners acknowledge, section 66452.6 does not require notice or a hearing. Further, neither the City nor adjoining landowners are permitted to revisit or reconsider issues, such as the concerns now raised, upon

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[6] Even petitioners conceded below that had the developer here complied with the terms of the tentative map within the initial two years of the tentative map approval, "he would have been entitled to approval of the Final Map without any further public scrutiny." CR 24, p. 6. In other words, petitioners would have had no protectible property interest in final map approval, even if during the same period they had raised exactly the same claims alleged here.

which findings were required at the time of tentative map approval.

El Patio v. Permanent Rent Control Bd. is directly on point. In *El Patio*, the California Court of Appeal held that a City may not lawfully impose additional conditions on the approval of a tentative map extension. The court pointed to Government Code sections 66473 and 66474.1, which provide that, regardless of whether the tentative map is extended, a legislative body shall not deny final map approval "if it finds that the final . . . map is in substantial compliance *with the previously approved tentative map.*" Cal. Gov't Code § 66474.1 (italics added). The Court further explained the limited nature of an extension under Section 66452.6(e):

> [S]ection 66452.6 expressly permits an extension only as to "time." There is no provision which suggests that the legislative body or advisory body is to reconsider its findings under section 66474 when granting an extension of time and indeed, the requirements for notice upon approval of a tentative map (see *Horn v. County of Ventura, supra,* 24 Cal.3d 605) would make such a result unworkable."[7]

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[7] This interpretation is adopted in a leading California treatise on real property and land use: "Whether the period for the map will be extended by the local agency [under section 66452.6(e)] is purely discretionary. It can reject the developer's request for an extension. However, if the extension is granted, the local agency cannot reconsider its findings regarding the map, nor can it impose new conditions on the approval of the tentative map nor new conditions precedent to the approval of the final map." 7 Miller & Starr, *Current Law of Cal. Real Estate* (2d ed. 1990) Subdivisions § 20:125, p. 360.

110 Cal.App.3d at 928. Thereafter, the California Supreme Court denied review in the case. 110 Cal.App.3d at 929.

The other extension provisions in the Map Act reinforce the conclusion that a map extension does not invoke a protectible property interest or due process notice requirements. On two occasions, the California Legislature has enacted mandatory extensions of tentative maps in California Government Code sections 66452.11 and 66452.13, which are automatically approved without more.[8] Petitioners allude to those extensions in their amended complaint as if they apply to *all* the extensions at issue; in the briefs below, they noted that two extensions (the extensions in 1993 and 1996) were granted under these Map Act provisions. ER 6, CR 14. Even assuming petitioners had bona fide health and safety concerns, no further hearing would be required for the grant of these extensions.

California Government Code section 66452.6(b)(1) additionally provides that a "development moratorium" automatically extends the time of a tentative map

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[8] California Government Code section 66452.11(a) provides: "The expiration date of any tentative subdivision map or parcel map for which a tentative map has been approved that has not expired on the date that the act that adds this section becomes effective [September 13, 1993] shall be extended by 24 months." Similarly, California Government Code section 66452.13(a) states: "The expiration date of any tentative or vesting tentative subdivision map or parcel map for which a tentative map or vesting tentative map has been approved, that has not expired on or before the date the act that adds this section becomes effective [May 15, 1996] shall be extended by 12 months."

approval or extension for up to five additional years. Similarly, a tentative map is extended to account for the period of time in which a lawsuit involving the approval or conditional approval of the tentative map is pending. Cal. Gov't Code § 66452.6(c). Still further, a tentative map for a subdivision that is subject to a development agreement may be extended for the period of time provided in the agreement (Cal. Gov't Code § 66452.6(a)) – a period which may be indefinite since the length of its life is a matter for negotiation. Cal. Gov't Code §§ 65864-65869.5. Again, even with these potentially very lengthy extensions of time, adjoining landowners have no protectible property interest at stake, and thus no constitutional due process right to have health and safety concerns aired anew.

In fact, under the Map Act, a timely failure to act on a request for tentative map extension results in a "deemed approval," which divests even the local agency of the right to review the extension. Cal. Gov't Code § 66452.5(c); *Griffis v. County of Mono*, 163 Cal.App.3d 414, 428-30, 209 Cal.Rptr. 519 (1985) (tentative map deemed extended due to failure to timely decide developer's appeal of a decision to rescind previously granted extension).

In short, California's statutory framework for subdivision regulation and the California cases which have interpreted it fully undermine petitioners' argument that California's statutory law clearly establishes that a protected property right in a map extension. There is no dispute in this case that the City granted tentative map approval for the project after providing public notice to affected landowners then of record. Due process was fully satisfied at the time the tentative map was

approved. Four map extensions were then approved before the City, in October 1997, granted its approval of the final map. Again, although not disclosed by the amended complaint, two extensions were legislatively-mandated and automatic under Government Code sections 66452.11 and 66452.13. The other two extensions were granted pursuant to section 66452.6, but, as explained, involved discretion limited to questions of time and no change in the character or intensity of the use previously considered and approved. The extensions did not establish any new substantive rights; they merely extended rights already granted for a longer period of time. *See e.g., Benton v. County of Napa*, 226 Cal.App.3d 1485, 1492, 277 Cal.Rptr. 541 (1991) (making the point as to the extension of a use permit). Petitioners were *not* entitled to reconsideration of the findings concerning safety, habitat or any of the other issues mandated for resolution at the tentative map stage, and the developer was entitled consideration of the time extension without further public notification. *El Patio*, 110 Cal.App.3d at 928.

In view of clear California statutory and case law demonstrating that petitioners have no protected property interest at issue, the lower courts simply could have ordered this action dismissed outright. Instead, the court of appeals noted that the California Supreme Court has not squarely addressed the issue, and consequently it held that the third prong of the *Pullman* test is satisfied in this case because the state law issue is uncertain. The court of appeals' decision was proper in all respects, and does not warrant review by this Court.

B. Petitioners Ignore the Map Act and Applicable California Case Law and Offer Inapposite Statutory Authority.

Petitioners conspicuously ignore the statutory scheme of the Map Act and the cases which have shaped California's subdivision law. Likewise, they acknowledge, but essentially disregard, the state court decision in *El Patio*. Instead, petitioners argue that the court of appeals erred based upon statutory provisions which are irrelevant to the state law question of whether they have a protected property interest in a map extension.

Petitioners erroneously cite Government Code sections 65033 and 65103 as though they stand for the proposition that public participation is required at each stage of the subdivision process. These are statutory provisions contained in the State Planning and Zoning Law (Cal. Gov't Code § 65000 et seq.). They articulate state policy with respect to planning and zoning matters, but have no bearing on subdivisions which, as explained, are separately regulated under the Map Act, California Government Code section 66410 et seq.

Petitioners also miscite California Government Code sections 65961 and 66498.1. The filing of the final map establishes the subdivision, but in order to build upon the land the developer must still comply with any applicable requirements for obtaining building or other permits. Sections 65961 and 66498.1 are directed to the latter types of approvals, not the subdivision itself. Petitioners erroneously state that Section 65961 permits a local agency for public health and safety reasons to impose additional conditions on an already approved tentative map upon

recordation of the final map. The section provides a city with authority to revisit a legitimate safety issue prior to the time it issues "a building permit or equivalent permit."

Petitioners likewise mischaracterize Section 66498.1 which applies to vesting tentative maps.[9] Section 66498.1 is somewhat broader than section 65961, and permits a city to deny or condition a "permit, approval, extension, or entitlement" if it finds that "a failure to do so would place the residents of the subdivision or the immediate community, or both, in a condition dangerous to their health or safety, or both." The provision is inapplicable here, first, because this case involves an ordinary tentative map, not a vesting tentative map. Moreover, contrary to petitioners' assertion, this provision is directed at the *other* types of land use approvals which follow subdivision approval (*e.g.*, building permit, site plan approval, conditional use permit and variance), not the approval of a vesting tentative map, the extension of such a map or the approval of a final vesting map. *See e.g., Davidson v. County of San Diego*, 49 Cal.App.4th 639, 56 Cal.Rptr.2d 617 (1996) (applying section 66498.1 to a building permit)

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[9] A vesting tentative map gives a developer a vested right to proceed with development, including the right to obtain all necessary building permits and discretionary approvals, in accordance with the local ordinances, policies and standards in effect when the application for the vesting tentative map was complete. Cal. Gov't Code § 66498.1.

Lastly, petitioners note that the City's subdivision ordinance includes a provision for tentative map extensions which requires the city planner or planning commission to find that the extension "is not likely to cause public health or safety problems." That portion of the extension provision, however, is inconsistent with the Map Act, as discussed above. Under California law, local ordinances which are inconsistent with the language and apparent intent of the statute are invalid. *Friends of Lake Arrowhead v. Board of Supervisors*, 38 Cal.App.3d 497, 505, 113 Cal.Rptr. 539 (1974). Thus, several California appellate cases have held that local agencies are not authorized to modify, by ordinance, procedures for tentative map extensions set forth in Government Code section 66452.6. *Griffis*, 163 Cal.App.3d at 426 (county code provision "unlawful and void" to extent it divested advisory agency of authority to grant a tentative map extension or to limits maximum duration to one year); *Friends of Lake Arrowhead*, 38 Cal.App.3d at 508 (county code provision giving "any aggrieved person" the right of administrative appeal is preempted by the Map Act section limiting the right of appeal to subdividers); *El Patio*, 110 Cal.App.3d at 928 (local agency may not reconsider its findings in approving the tentative map or impose new conditions on a grant of tentative map extension). Consequently, the City's ordinance is not helpful to petitioners.

In sum, despite the absence of authority supporting petitioners' argument, and powerful authority pointing to dismissal, the court of appeals stayed its hand to allow the state courts, in the first instance, to determine whether petitioners have a protectible property interest in the time extension of a previously approved tentative

map.[10] The court's decision was proper and does not call for review by this Court.

II.

THE COURT OF APPEAL PROPERLY REFUSED TO CERTIFY THE STATE LAW QUESTION TO THE CALIFORNIA SUPREME COURT

Petitioners also argue that the court of appeals erred in refusing to certify the state law question of whether they have a protectible property interest directly to the

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[10] There are yet other uncertain state law issues which equally justified abstention on *Pullman* grounds. In an effort to mask that other state law issues might eliminate the need to decide federal constitutional questions, petitioners amended the original complaint to delete references to state law questions. The original complaint alleged that each tentative map extension granted was unlawful because the City "(1) failed to provide notice to affected property owners as required by federal and *state law*, and (2) *granted extensions in violation of local ordinances.*" SER 5; CR 1 (italics added). These further determinative issues of state law likewise are uncertain. Ninth Circuit cases consistently have held that whether a city has abused its discretion or has exceeded its jurisdiction in acting on a land use matter – questions which must be addressed under California's comprehensive administrative mandamus scheme – "is by nature a question turning on the peculiar facts of each case in light of the many local and statewide land use laws applicable." *Sederquist v. City of Tiburon*, 590 F.2d 278 (9th Cir. 1978). That court repeatedly has disclaimed any ability to predict whether a state court would decide that the city there abused its discretion. *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). Thus, *Pullman* abstention was justified, independent of whether or not petitioners have protectible property interests at stake.

California Supreme Court under Rule 29.5 of the California Rules of Court.[11]

This Court has held that the decision whether to certify a question of state law to a state supreme court rests in the sound discretion of the federal court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1941). There are a host of reasons why the court of appeals properly refused to invoke certification in this case.

First, certification is proper under Rule 29.5 only when "the decisions of the California appellate courts provide no controlling precedent concerning the certified question." *El Patio v. Permanent Rent Control Board* is the controlling state court of appeal precedent on the state law question that petitioners sought to have certified.

Second, petitioners provided no compelling reasons why they should be permitted to engineer their way around the state court system, only to have their matter catapulted into the State Supreme Court. Petitioners elected to file in federal court, although they had the right to file this action in state court and to obtain expeditious review of their state and federal claims. *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 786 n. 5 (9th Cir. 1986). As observed by the Fifth Circuit: "[T]he court should be slow to honor a request for certification

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[11] Rule 29.5, which became effective January 1, 1998, permits the California Supreme Court to answer questions of law certified to it by a federal appeals court, provided that: "(1) the certifying court requests the answer; (2) the questions may be determinative of a cause pending in the certifying court; and (3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question."

from a party who chose to invoke federal jurisdiction." *Jefferson v. Lead Industries Ass'n, Inc.*, 106 F.3d 1245, 1248 (5th Cir. 1997) (citing 17A Wright, Miller, Cooper, *Federal Practice and Procedure* § 4248, at 176 (1988)).

Third, the case is not procedurally or factually poised for review by the state's highest court. The issue sought to be certified is not the only state law involved. As previously discussed (note 10, *supra*), there are other uncertain state law questions which, if properly alleged in a timely state court mandamus action, could obviate the need for the California appellate courts to reach the question of whether petitioners have a protectible property interest in tentative map extensions. See *In re Complaint of McLinn*, 744 F.2d 677 (9th Cir. 1984) (certification not proper where the issue sought to be certified is only one of many involved in the litigation).

Fourth, certification also is not appropriate where it would enable a party, like petitioners here, to evade serious procedural defects in the complaint which would be presented for State Supreme Court review. While these petitioners complain loudly that they had due process rights to notice and an opportunity to be heard concerning the tentative map extensions at issue, they deliberately chose not to name the developer whose valuable subdivision entitlement they seek to invalidate. This simply would not be permissible had the case been filed in state court. *See e.g., Sierra Club, Inc. v. California Coastal Comm'n*, 95 Cal.App.3d 495, 501-02, 157 Cal.Rptr. 190 (1979) (failure to timely name developer whose land use permit is challenged as an indispensable party warrants dismissal of action); *Save Our Bay, Inc. v. San Diego Unified*

Port Dist., 42 Cal.App.4th 686, 49 Cal.Rptr. 847 (1996) (applying same rule to failure to name developer in an action challenging an environmental impact report). Indeed, this may explain why the action was filed in federal court. Petitioners should not profit from this tactic. The court of appeals properly refused to saddle the California Supreme Court with an issue in the absence of the true real party in interest.

Fifth, certification is not appropriate where the matter lacks an adequate factual record. Except as embellished by the parties, the record in this case, with one exception, contains no evidence at all concerning the tentative map extensions at issue or the circumstances surrounding their approval. See ER 6; CR 14. The exception is a letter reflecting an *automatic* extension granted by the California Legislature. Cal. Gov't Code § 66452.13; ER 65; CR 16, Exh. 2.

Finally, the issue sought to be certified is not pending before the State Supreme Court nor is it a question so pressing that certification to the state's highest court is an imperative. *Cf. Bellotti v. Baird*, 428 U.S. 132 (1976) (certifying the issue of the meaning of a state statute governing the type of consent required for an abortion on an unmarried woman under the age of 18), cited by petitioners.

Petitioners disingenuously offer delay and expense as reasons for certification. Frankly, if these were bona fide concerns (as opposed to petitioners' consistent efforts to delay and thereby block this project), petitioners simply could have filed their mandamus action in

state court after receipt of the abstention order in December 1997. The state court process would have long since concluded by now.

The court of appeals properly exercised its discretion in concluding that this is not a proper case for certification.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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